No. 25

In the Supreme Court of the United States

OCTOBER TERM, 1960

GUS POLITES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the court of appeals is reported at 272 F. 2d 709. The opinion of the district court (R. 203–206) is reported at 24 F.R.D. 401. The earlier opinion of the district court revoking petitioner's citizenship (R. 175–186) is reported at 127 F. Supp. 768.

JURISDICTION

The judgment of the court of appeals was entered on October 16, 1959 (R. 207). The petition for a writ of certiorari was filed on January 5, 1960, and granted on February 23, 1960 (R. 207; 361 U.S. 958). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, almost five years after petitioner agreed by stipulation to a dismissal with prejudice of his appeal from a judgment of denaturalization, he may collaterally attack that judgment under Rule 60(b) of the Federal Rules of Civil Procedure, on the ground that subsequent decisions of this Court have established that his denaturalization was erroneous.

2. Whether the judgment of denaturalization entered against petitioner was, in fact, erroneous.

STATUTE AND RULE INVOLVED

Section 305 of the Nationality Act of October 14, 1940, 54 Stat. 1137, 1141, provided in pertinent part:

> No person shall hereafter be naturalized as a citizen of the United States—
>
> * * * * *
>
> (b) Who believes in, advises, advocates, or teaches, or who is a member of or affiliated with any organization, association, society, or group that believes in, advises, advocates, or teaches—
>
> (1) the overthrow by force or violence of the Government of the United States or of all forms of law; * * *
>
> * * * * *
>
> The provisions of this section shall be applicable to any applicant for naturalization who at any time within a period of ten years immediately preceding the filing of the petition for naturalization is, or has been, found to be within any of the clauses enumerated in this section, notwithstanding that at the time petition is filed he may not be included in such classes.

Section 338(a) of the Nationality Act of 1940, 54 Stat. 1158, provided:

> It shall be the duty of the United State district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings * * * for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured.

Rule 60(b) of the Federal Rules of Civil Procedure provides, in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment,

order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. * * *

STATEMENT

Petitioner, who was born in Greece and entered this country in 1916, was naturalized in the United States District Court for the Eastern District of Michigan on April 6, 1942, under the provisions of the Nationality Act of 1940 (R. 1–2, 6, 175). On June 16, 1952, the government filed a complaint seeking cancellation of the certificate of naturalization under Section 338(a) of the 1940 Act, *supra*, on the grounds of fraud and illegal procurement (R. 1–5). An affidivit of good cause detailing these charges was filed with the complaint (R. 5–9).

As to fraud, the complaint charged that, although petitioner had been a member of the Communist Party from 1933 to at least 1941 and knew and approved of its activities and aims, he swore in the proceedings leading up to his naturalization, *inter alia*, (1) that he had not within the previous five years belonged to, been affiliated with, or active in any organizations devoted in whole or in part to influencing or furthering the political activities of a foreign government,[1] (2) that he believed in the form of government of the

[1] These answers were given by petitioner on December 16, 1940, in registering as an alien pursuant to Title III of the Alien Registration Act of 1940, 54 Stat. 670, 673–676 (R. 2, 30–31).

United States,[2] and (3) that he was attached to and would defend the principles of the Constitution of the United States[3] (R. 1–3). Petitioner, the government charged, knowingly swore falsely in giving these answers in order to prevent a full and proper investigation of his qualifications for citizenship, and to procure a certificate of naturalization in violation of law (R. 3–4).

The charge of illegal procurement was that petitioner was not a person of good moral character for the requisite statutory period preceding his application for naturalization, was not attached to the principles of the Constitution, and was not eligible for naturalization because, within ten years immediately preceding his filing of a petition for naturalization, he had been a member of an organization which advocated the overthrow by force and violence of the Government of the United States (R. 4–5).

At the denaturalization proceeding in the district court, petitioner testified that he was a member of the Communist Party of the United States from "around" 1931 until 1938 (R. 35–36), during which time he attended "closed meetings"[4] about once a month (R.

[2] This answer was given on October 6, 1941, to a Naturalization Examiner in response to questions on the Preliminary Form for Petition for Naturalization (R. 15–16).

[3] This statement was made in the Petition for Naturalization filed on October 6, 1941, and in the oath of allegiance to the United States taken by petitioner on April 6, 1942 (R. 1–3, 13–14).

[4] A meeting that is closed to everyone but a member of the Communist Party (R. 41).

35–36, 41–43). He also stated that he was the Secretary of the Greek Fraction[5] of the Communist Party in Detroit in 1934 or 1935 (R. 48–49, 60–61), and, in that capacity, conducted meetings and made reports to the National Office of the Greek Fraction in New York (R. 64–65, 67, 68); that he was a member of the Bureau of the Fraction for a somewhat longer period of time (R. 115–116); and that he left the Communist Party in 1938 not because of any difference with its aims and objectives, but because of the receipt of a directive from the Party that all aliens cease membership. He further testified that he believed in the aims and objectives of the Party when he was naturalized in 1942 (R. 108–109).

Leo Syrakis testified that he was introduced into the Communist movement by petitioner in 1935, and became a member of the Party that year; that petitioner was the Agitprop Director[6] of the unit Syrakis joined, and General Secretary of the Greek Fraction in Michigan—*i.e.*, the director of all Greek activities in the Communist Party of Michigan (R. 120–122, 128–129). The witness further recalled that, at numerous closed meetings in 1935, petitioner spoke of the necessity of overthrow of the government by force and violence, pointing out that the workers would never be able to get control of the government by vote (R. 125–127, 132; see also R. 123–124).

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[5] A "fraction" is "a group of members of the Communist Party working within a non-Communist organization to carry out the policies of the Communist Party" (R. 161).

[6] As Syrakis explained it, the duty of the Agitprop Director was to educate the members of the unit in Communism (R. 122).

William Nowell testified that between 1931 and 1936 he attended closed Communist meetings with petitioner in Detroit and that to his knowledge petitioner was a "high functionary" of the Party and attended functionary meetings. He also stated that he heard petitioner advocate the overthrow of the government by force and violence at various closed Party meetings, between 1931 and 1936 (R. 163–171).

On August 20, 1953, the district court issued a decree revoking the order of April 6, 1942, which had admitted petitioner to citizenship, cancelling the certificate of naturalization, and restraining petitioner from claiming any rights under the certificate (R. 186–187). In its opinion filed on August 13, 1953 (R. 175–186), the court, after reviewing the evidence, found that the government had shown clearly and convincingly that the Communist Party, of which petitioner had been a member within ten years prior to his naturalization, advocated the overthrow of the government of the United States by force and violence (R. 176–180); that petitioner "was guilty of fraud in securing his American citizenship" (R. 183); and that he had illegally procured the certificate because "he was not * * * eligible for citizenship," due to his Communist Party membership within the statutorily prescribed ten-year period, "the prohibition being jurisdictional" (R. 177, 176–180).

On October 15, 1953, petitioner filed a notice of appeal from the judgment of the district court (R. 187) but took no further action. On November 10, 1954, upon stipulation of the parties, the appeal was

dismissed with prejudice by the Court of Appeals for the Sixth Circuit (R. 188).

Almost five years later, on August 6, 1958, petitioner, pursuant to Rule 60(b) (5) and (6) of the Federal Rules of Civil Procedure (*supra*, pp. 3–4), moved in the District Court for the Eastern District of Michigan to set aside the denaturalization decree of August 20, 1953, and to reinstate the judgment of naturalization of April 6, 1942 (R. 188–198). Petitioner contended that under the principles enunciated by this Court in *Nowak* v. *United States*, 356 U.S. 660, and *Maisenberg* v. *United States*, 356 U.S. 670, the judgment of cancellation "is voidable [and] it is no longer equitable that said judgment should have prospective application * * *" (R. 191).

On November 19, 1958, the district court (Picard, D.J.) denied the motion (R. 203–206). The court held that the *Nowak* and *Maisenberg* decisions "* * * do not * * * clearly control the instant case" (R. 205), and that, under the doctrine of *Ackermann* v. *United States*, 340 U.S. 193, petitioner could not collaterally attack the denaturalization judgment in a Rule 60(b) proceeding on the ground that there had been a change in the judicial view of the applicable law (R. 206).

On October 16, 1959, the court of appeals unanimously affirmed "for the reasons set forth" in the opinion of the district court (R. 207).

SUMMARY OF ARGUMENT

The present proceeding was instituted five years after petitioner's stipulation, while represented by

freely chosen counsel, to a dismissal *with prejudice* of his appeal from a judgment of denaturalization. It constitutes an attempt on his part to attack that judgment collaterally under Rule 60(b) of the Federal Rules of Civil Procedure on the ground that, although he decided that an appeal was futile because of decisions of the court of appeals which this Court declined to review, he may utilize the Rule to do the service of an appeal since subsequent decisions of this Court, over four years later, have endowed his legal contentions with more merit.

It is the government's position that, having voluntarily chosen not to prosecute his appeal, petitioner cannot resort to Rule 60(b) as a substitute for timely appeal because of an alleged change in the legal climate. We further submit that, even if the Court were to find that petitioner may now proceed under the Rule, the judgment of denaturalization is, in any event, valid on the merits.

I

A. Petitioner contends that he is entitled to relief from the judgment of denaturalization under clause (6) of Rule 60(b), which authorizes the district court to grant relief for "any other reason justifying relief from the operation of the judgment." But, this contention is squarely controlled by *Ackermann* v. *United States*, 340 U.S. 193, which held that a voluntary, unfettered, decision not to appeal a denaturalization decree may not be excused by permitting recourse to Rule 60(b)(6) as a substitute for appeal. In that case, the Ackermanns, in moving under Rule 60(b),

attempted to explain their failure to appeal on the grounds that their counsel had told them that they would have to sell their home to bear the cost of appeal and the government official in charge of the detention camp in which they had been placed following their denaturalization advised them not to appeal. Nonetheless, this Court rejected their assertions, agreeing with the district court that the Ackermanns had not established that the failure to appeal was sufficiently excusable to bring them within Rule 60(b). As this Court stated (340 U.S. at 198): "[Petitioner's] choice was a risk, but calculated and deliberate and such as follows a free choice. Petitioner cannot be relieved of such a choice because hindsight seems to indicate to him that his decision not to appeal was probably wrong * * *."

There is even less basis for allowing relief under Rule 60(b) here than in *Ackermann*. Like the Ackermanns, petitioner represented by freely chosen counsel actively participated in the denaturalization trial; like the Ackermanns, he decided not to appeal; and hence, like the Ackermanns, he should be bound to accept the consequences of that choice. But the Ackermanns alleged facts which, the dissenters in this Court concluded, might show that their decision not to appeal was not voluntary. In contrast, petitioner does not, and cannot, even claim that his decision was anything but a personal decision freely arrived at. In short, for all the reasons set forth in *Ackermann*, petitioner in this case may not be relieved from the judgment under Rule 60(b)(6).

B. 1. It is well established that a change in the judicial view of applicable law affords no basis for a motion to vacate a final judgment entered before announcement of that change. *Scotten* v. *Littlefield*, 235 U.S. 407, 410–411; cf. *Simmons Co.* v. *Grier Bros. Co.*, 258 U.S. 82, 88. Indeed, that very question was involved in *Ackermann*. There, following the judgments of denaturalization, this Court decided *Baumgartner* v. *United States*, 322 U.S. 665, which significantly weakened the legal basis for the denaturalization of the Ackermanns. The government stipulated on the basis of the *Baumgartner* decision to the dismissal of the judgment of denaturalization against Keilbar, a co-defendant of the Ackermanns, who had appealed. Nevertheless, this Court found that the change in the law was insufficient to excuse the Ackermanns' voluntary decision not to appeal.

2. Nor can petitioner obtain relief from the judgment under clause (5) of Rule 60(b) providing for relief when "it is no longer equitable that the judgment should have prospective application". That language applies to the prospective features of a judgment, not the original decree. For example, the rule applies where conditions arising subsequent to the issuance of a continuing injunction are such as warrant modification. The prospective effects of the judgment here, however, consist wholly of the consequences that flow from that part of the judgment of denaturalization which revoked the grant of naturalization and cancelled the certificate of citizenship. As this

Court said in *United States* v. *Swift & Co.*, 286 U.S. 106, 119, in considering the principle later embodied in subsection (5): "The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting." In this case, petitioner is seeking a reversal of the original judgment, not a true readjustment.

3. The basic consideration of this issue is the long-standing policy of the law to protect the finality of judgments. If petitioner's contentions were sustained, whenever this Court or a court of appeals overruled or modified a prior decision, or crystallized the law, every lower court judgment not in conformity with the new decision would be subject to reexamination. But as this Court stated in *Ackermann*, 340 U.S. at 198, "There must be an end to litigation someday * * *."

II

Even if petitioner had standing to obtain relief under Rule 60(b), the judgment of denaturalization was correct because petitioner's admitted membership in the Communist Party in the ten-year period preceding his naturalization in 1942 rendered his naturalization illegal under the Nationality Act of 1940, 54 Stat. 1137.

A. 1. Section 305 of the Nationality Act of 1940 renders ineligible for naturalization a person who within ten years preceding his application for citizenship is a member of an organization advocating forcible or violent overthrow of the Government of the

United States. As the district court held, the evidence adduced at petitioner's denaturalization trial was "clear, unequivocal and convincing" that petitioner was a member of the Communist Party during the proscribed period, and that the Party advocated forcible and violent overthrow of the Government of the United States during that period.

Petitioner himself admitted that he was a Party member from 1931 to 1938, that he attended monthly closed Party meetings, that he was Secretary of the Greek Fraction of the Party in Detroit, and that he left the Party in 1938, not because of disagreement with Party's objectives but only because of a Party directive that aliens resign. Two government witnesses confirmed that petitioner was an active Party member and an important functionary. In short, petitioner's Communist Party membership was not accidental or artificial but a purposeful and knowledgeable association with the Party as a distinct political entity. He was clearly a "member" within the standards laid down by this Court in deportation cases (*e.g., Galvan* v. *Press,* 347 U.S. 522; *Rowoldt* v. *Perfetto,* 355 U.S. 113), and likewise a member within the prohibitions of Section 305.

The finding of the district court that, during petitioner's membership, the Communist Party advocated forcible and violent overthrow of the Government of the United States is convincingly borne out by the evidence, and is not contested here.

2. The legislative history of the Nationality Act of 1940 confirms that members of the Communist Party within ten years preceding their application for citi-

zenship were rendered ineligible for citizenship under that Act. The hearings before the House Committee on Immigration and Naturalization, which ultimately resulted in the Nationality Act, show that Section 305 was intended to take "care of Communists and those who advocate the overthrow of the Government." That this intent was carried out by Section 305 is not only emphasized by these hearings, but reiterated in debate in the House and in the Senate and House Reports.

Additionally, both the language and legislative background of Section 305 show that it was not meant by Congress to be limited to those members with personal knowledge of the organization's illicit purposes. Section 305 specifically excludes from citizenship *both* those who personally advocated overthrow by force and violence and those who were members of organizations with such unlawful objectives, and the Senate Report similarly emphasizes that Section 305 was meant to cover those who personally "entertained" prescribed aims, as well as those "affiliated" with, or "members" of, an organization whose objectives were illegal.

B. 1. It is well established that, when Congress has provided for cancellation of a certificate of naturalization on the ground that it has been illegally procured, the certificate may be cancelled upon proof that the alien was ineligible when naturalized. This Court has consistently ruled, in a variety of situations involving less crucial conditions than the one involved in this case, that the certificate is cancellable on the basis of illegal procurement unless there is strict compliance

with conditions which Congress has imposed as a prerequisite to an award of citizenship. This rule has been applied to such comparatively unimportant conditions as the failure to file a certificate of arrival, *United States* v. *Ness*, 245 U.S. 319, and the holding of the naturalization hearing in an improper place, *United States* v. *Ginsberg*, 243 U.S. 472. It would be strange indeed not to apply this rule where, as here, the condition involved was adopted by Congress because of its grave concern with the imminent threat of a world war.

2. *Schneiderman* v. *United States*, 320 U.S. 118, is not inconsistent with applying the doctrine of illegal procurement to this case. The Court in *Schneiderman* was dealing with the situation in which illegality was predicated upon the claim that the personal attitude of the applicant was irreconcilable with the requirement of attachment to the principles of the Constitution. The government sought to prove this attitude by inferring from Schneiderman's membership and position in the Party that Schneiderman himself believed in violent overthrow and therefore was not attached to the principles of the Constitution. As the Court pointed out, the government's case was thus premised upon "the admitted infirmities of proof by imputation." *Id.*, p. 154.

In this case, however, the proof was not based on inference or imputation. The test was not whether personal advocacy could be inferred from membership in the Communist Party; the question was simply whether petitioner was a member of a particular kind of organization at a particular time.

Moreover, the condition of attachment involved in *Schneiderman* could reasonably be read as satisfied by the finding of the *naturalization* court. Indeed, Mr. Justice Douglas, concurring in that case (320 U.S. 161, 162–163), specifically contrasted the condition involved there with the kind of unyielding condition involved here which went to the very jurisdictional base of the naturalization decree. In sum, the situation in this case is the sort described by Mr. Justice Holmes in *Maney* v. *United States,* 278 U.S. 17, 23, where the judgment of naturalization transcended the power of the naturalization Court and "may be declared void in the interest of the sovereign who gave to the judge whatever power he had."

3. The discussion of *Schneiderman* also disposes of petitioner's claim that this case is indistinguishable from the holding of *Nowak* v. *United States,* 356 U.S. 660, on the issue of illegal procurement. Since Nowak was naturalized under the Nationality Act of 1906, which did not, in terms, prohibit citizenships to members of organizations advocating overthrow of the government, the illegal procurement charge, as in *Schneiderman,* was predicated upon the personal test of lack of attachment. Hence the government was required to prove not merely that Nowak was a member of the Communist Party, but that the Party had illegal objectives of which petitioner was aware and which he endorsed. Since the government failed to show such endorsement, the Court reversed the denaturalization decree despite its finding that Nowak was an active member of the Party.

Here, however, the 1940 Act barred citizenship to persons who belonged, within the preceding ten years, to an organization advocating overthrow of the government by force and violence. Under that provision, the government's proof that petitioner was an active member of the Party and that the Party advocated forcible and violent overthrow was the complete proof required to show illegal procurement.

ARGUMENT

Petitioner seeks relief from a final judgment of denaturalization under Rule 60(b) of the Federal Rules of Civil Procedure, *supra*, pp. 3–4. More than one year having elapsed since the judgment before petitioner filed his motion, he is clearly not entitled to relief under clause (1) of Rule 60(b) on the ground of "mistake, inadvertence, surprise, or excusable neglect." Therefore, petitioner moved under clause (5) of the Rule which allows the district court to grant relief where it is "no longer equitable that the judgment should have prospective application" and under clause (6) authorizing the court to act for "any other reason justifying relief from the operation of the judgment."

Hence, once again, as in *Klapprott* v. *United States*, 335 U.S. 601, modified, 336 U.S. 942, and *Ackermann* v. *United States*, 340 U.S. 193, this Court has before it the question of the availability of relief from a final judgment of denaturalization under Rule 60(b) of the Federal Rules of Civil Procedure. Unlike either *Klapprott* or *Ackermann*, however, the complaint in this case is not predicated on any claim

that governmental intervention prevented petitioner from participating in the denaturalization trial or in taking an appeal. Petitioner, who was represented by freely chosen counsel, voluntarily stipulated that his appeal should be dismissed *with prejudice*. Basically, his claim is that, although he then deemed an appeal futile because of decisions by the court of appeals which this Court declined to review,[7] subsequent decisions of this Court over four years later[8] have endowed the appeal with more merit.

The government's position is that, after having voluntarily chosen (through his own counsel) not to appeal the judgment of denaturalization, petitioner cannot resort to Rule 60(b) as a substitute for a timely appeal. Otherwise, litigation would never end since any change in the law would allow judgments to be reopened. We further contend that, even if the Court were to hold that the final judgment of denaturalization in this case is now open to collateral attack, the judgment is valid on the merits.

I

PETITIONER, HAVING DELIBERATELY CHOSEN NOT TO APPEAL, CANNOT RELY ON RULE 60(b) AS A SUBSTITUTE FOR APPEAL

A. Rule 60(b) is not available to relieve a litigant from his prior voluntary decision not to appeal

The instant case is squarely controlled by the decision of this Court in *Ackermann* v. *United States*, 340 U.S. 193, that a freely made decision not to appeal a denaturalization judgment may not be excused by

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[7] *Sweet* v. *United States*, 211 F. 2d 118 (C.A. 6), certiorari denied, 348 U.S. 817.

[8] *Nowak* v. *United States*, 356 U.S. 660, and *Maisenberg* v. *United States*, 356 U.S. 670.

permitting recourse to Rule 60(b)(6) as a substitute for appeal. In that case the United States had filed separate but identical complaints to revoke the citizenship of the Ackermanns and had filed a similar complaint against Keilbar (Mrs. Ackermann's brother). The complaints charged fraud in the oaths pledging allegiance to the United States and foreswearing allegiance to Germany. Each defendant, represented by counsel, defended against the suits which had been consolidated for trial. Following a trial on the merits, separate judgments of denaturalization were entered against each. The Ackermanns did not appeal. Keilbar, however, appealed, and the judgment of denaturalization against him was reversed under a stipulation with the United States Attorney that the evidence was insufficient to support it. *Keilbar* v. *United States;* 144 F. 2d 866 (C.A. 5).

Approximately four years after the decree of denaturalization the Ackermanns moved for relief under Rule 60(b) seeking to excuse their failure to appeal on the ground of financial inability, in that their attorney had told them that they would have to sell their home to pay the cost of appeal, and on the claim that they had relied upon the advice of a government official in charge of the detention camp in which they had been placed following their denaturalization. The district court found no merit to these claims and denied their motions to vacate the final orders of denaturalization. This Court agreed with that determination, holding that the Ackermanns' allegations did not establish that failure to appeal was sufficiently

excusable or justifiable to bring them within Rule 60(b)(6).[9] As the Court explained the rationale of its holding (340 U.S. at 198):

> Petitioner made a considered choice not to appeal, apparently because he did not feel that an appeal would prove to be worth what he thought was a required sacrifice of his home. His choice was a risk, but calculated and deliberate and such as follows a free choice. Petitioner cannot be relieved of such a choice because hindsight seems to indicate to him that his decision not to appeal was probably wrong, considering the outcome of the *Keilbar* case. There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from.[10]

In a word, petitioner's lack of standing to seek relief under Rule 60(b) follows *a fortiori* from *Ackermann*. Just as did the Ackermanns, petitioner (who was represented by counsel) participated actively in his denaturalization trial; like the Ackermanns, he freely chose

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[9] As in this case, relief there was not available under clause (1) of Rule 60(b) since the motion for relief was made more than one year after judgment was entered.

[10] The *Ackermann* rationale that Rule 60(b) is not a substitute for appeal has been followed by the various courts of appeals. See, *e.g.*, *Morse-Starrett Products Co.* v. *Steccone*, 205 F. 2d, 244, 249 (C.A. 9): "The provisions of Rule 60(b)(6) were not intended to benefit the unsuccessful litigant who long after the time during which an appeal from a final judgment could have been perfected first seeks to express his dissatisfaction"; *Elgin National Watch Co.* v. *Barrett*, 213 F. 2d 776, 779-780 (C.A. 5); *Title* v. *United States*, 263 F. 2d 28, 31 (C.A. 9), certiorari denied, 359 U.S. 989; *Collins* v. *City of Wichita*, 254 F. 2d 837 (C.A. 10); *Berryhill* v. *United States*, 199 F. 2d 217 (C.A. 6). For a similar view prior to *Ackermann*, see *United States* v. *Kunz*, 163 F. 2d 344, 346 (C.A. 2).

not to appeal after weighing what he deemed to be the decisive factors essential to the making of a rational decision in that regard; and hence, like the Ackermanns, he should be bound to accept the consequences of that choice. As a matter of fact, the reasons submitted by petitioner in asking this Court to excuse his failure to continue with his appeal have even less appearance of validity than the reasons asserted by the Ackermanns and rejected by this Court. There is no claim in this case that pressing financial considerations influenced petitioner's decision, or that he relied upon the advice of a government official—this latter contention carrying with it the implicit claim that governmental interference frustrated appeal. In contrast, petitioner asserts that his decision not to appeal was dictated by the conclusion that the then status of the law would render an appeal futile. It was thus, undeniably a personal choice, freely arrived at, in which freely chosen counsel participated.[11]

The tactical decision made by petitioner is the kind of "voluntary, deliberate, free, untrammeled choice * * * not to appeal", which in *Ackermann* (340 U.S., at 200) was held to be the decisive criterion for determining whether reasons sufficient for Rule 60(b)(6) relief had been stated. Otherwise, it would seem that any losing party could simply decide to forego appeal because he believed the time inappropriate, and could secure exactly the same relief through collateral attack at a more propitious moment when, perhaps, the

[11] Petitioner's counsel then and now was also counsel in the *Nowak* and *Maisenberg* cases, *supra*, 356 U.S. 660, 670, as well as in *Sweet*, *Chomiak*, and *Charnawola*, *supra*, 211 F. 2d 118.

legal climate had changed. The net result would be to transform Rule 60(b)(6) relief into an easy alternative for direct appeal, available after the time for appeal has expired.[12]

That this is not the purpose of collateral review is made clear not only by *Ackermann*, but by *Sunal* v. *Large*, 332 U.S. 174. There, this Court dealt with the question of the right to obtain review, by writ of habeas corpus, of a criminal conviction from which the defendant had failed to appeal. In that case, at the time an appeal would have had to be taken from a conviction for refusing to submit to induction in the military, decisions of several courts of appeals, including that for the circuit to which appeal would

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[12] The dissenters in *Ackermann* (340 U.S. at 202) did not disagree with the majority on the fundamental proposition that a freely made decision not to appeal may not be remedied at a later date by way of Rule 60(b) motion. The dissent proceeded on the hypothesis that the district court had denied the Ackermanns' motion on the pleadings and therefore had found that, even if their allegations were true, they had stated no grounds which would have excused an appeal. The dissent felt that that court should have instead heard evidence to determine whether justice would best be served by granting relief from the judgments. 340 U.S. at 203. In other words, the dissenters believed that, if the Ackermanns' claim that they were in effect denied the opportunity to appeal was proven to be true, the district court had jurisdiction under Rule 60(b) to afford them relief from the denaturalization judgment.

In this case, however, there are no factual issues as to the reason petitioner dismissed his appeal which require resolution by the district court. Rather, our position is that even if the reason given by petitioner for terminating his appeal is true (that appeal was futile in view of the then state of the law), the district court was right in finding that it provided no basis for Rule 60(b) relief.

have lain, were squarely contrary to petitioner's contentions. Under later decisions of this Court, however, the district court would have been bound to consider the defense which had been tendered and rejected. As this Court phrased it, the argument made to sustain the habeas corpus attack was that "since the state of the law made appeals seem futile, it would be unfair * * * to conclude [petitioners] by their failure to appeal" (*id.*, p. 178). The Court rejected this argument, stating that, "since [petitioners] chose not to pursue the remedy which they had, we do not think they should now be allowed to justify their failure by saying they deemed any appeal futile" (*id.*, p. 181). Cf. *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 36–37. Just as in *Ackermann*, this Court in *Sunal*, while recognizing that collateral attack is an essential means of dealing with jurisdiction and exceptional cases of constitutional right, justice, and equity, found that it was not a remedy available to a litigant as a mere substitute for appeal of "errors of law"; in other words, it could not be distorted into a general method for obtaining relief from a judgment on any grounds which could have been raised on appeal (332 U.S. at 178–180).

No decision of this Court since *Ackermann* was decided in 1950 has weakened that holding. Petitioner attempts (Pet. Br. 26–27) to dispel the force of *Ackermann*, by relying upon *United States* v. *Ohio Power Co.*, 353 U.S. 98. But that case involved simply a construction by this Court of its own rules in vacating an order which denied a petition for rehearing, granting

certiorari, and reversing on the basis of recently decided cases.[13] In no way did the decision touch on Rule 60(b) or modify the holding of *Ackermann*.

Petitioner also notes (Pet. Br. 25) the statement of Mr. Justice Black in *Klapprott* v. *United States*, 335 U.S. 601, 614–615, that the "other reason" clause of Rule 60(b) was intended to authorize courts "to vacate judgments whenever such action is appropriate to accomplish justice." We do not see how this language aids petitioner when it was considered against the factual situation to which it was addressed. *Klapprott* involved what Mr. Justice Black characterized as "an extraordinary situation" (*id.* at 613), in which, assuming the truth of the allegations in that petitioner's motion for relief, he had been "deprived of any reasonable opportunity to make a defense" (*id.* at 613–614). In that case the motion for relief charged, *inter alia*, that when served with the complaint petitioner was ill and without funds; that prior to the entry of the default judgment he was arrested and imprisoned on a charge of violating the Selective Service Act,

[13] It is perhaps also significant that in *Ohio Power* the petition was granted by the Court on June 11, 1956, considerably less than a year after the petition had been denied on October 17, 1955, and the timely petition for rehearing had been denied on December 5, 1955. Moreover, the United States kept the issue before the Court by petitioning for leave to file a second petition for rehearing which was denied on May 28, 1956. See 353 U.S. at 100–101. Here, however, petitioner dismissed his appeal by stipulation on November 10, 1954, and did not move for relief under Rule 60(6) until almost five years later on August 6, 1958. He took no action during that five years to challenge the judgment.

on which his subsequent conviction was ultimately set aside by this Court; that a letter he had drafted to the Civil Liberties Union seeking legal assistance in his denaturalization action was taken from him by federal agents and never mailed; and that the lawyer appointed to defend him in the criminal case promised also to help him in the denaturalization action, but failed to do so. In short, if Klapprott's allegations were true, his failure to defend the denaturalization suit was due to circumstances beyond his control; he was prevented from appearing and defending against the suit by a combination of factors in which governmental intervention and harassment played a major role. On the basis of these contentions, the Court ruled that Klapprott was entitled to a hearing in the district court.[14] Accord, *United States* v. *Karahalias,* 205 F. 2d 331 (C.A. 2); *United States* v. *Backofen,* 176 F. 2d 263 (C.A. 3).

Simply to state the allegations of *Klapprott* is, we submit, to place in bold relief the crucial distinctions between that case and this. In *Klapprott,* ill health

[14] The original judgment of the Court, considering these allegations as true, ordered that the district court set aside the default judgment and grant petitioner an opportunity to contest the naturalization action. 335 U.S. at 616. This judgment was thereafter modified to remand the cause to the district court with directions to receive evidence to determine the truth or falsity of petitioner's allegations contained in the motion to vacate. 336 U.S. 942. Following such a hearing, the district court found the allegations to be false and that Klapprott was in no way obstructed from defending against the action. *United States* v. *Klapprott,* 9 F.R.D. 282, affirmed, 183 F. 2d 474 (C.A. 3), certiorari denied, 340 U.S. 896.

and continued governmental harassment were alleged to have completely frustrated the defendant's opportunity to participate in any stage of the denaturalization proceedings at all. In this case, after having appeared and actively defended the government's suit at trial, petitioner freely chose not to proceed further. What was said in *Ackermann* has, therefore, if anything, more than equal force here (340 U.S. at 202):

> The comparison strikingly points up the difference between no choice and choice; imprisonment and freedom of action; no trial and trial; no counsel and counsel; no chance for negligence and inexcusable negligence. Subsection (6) of Rule 60(b) has no application to the situation of petitioner. Neither the circumstances of petitioner nor his excuse for not appealing is so extraordinary as to bring him within *Klapprott* or Rule 60(b)(6).

7 Moore, *Federal Practice* (2d ed., 1955), pp. 294–304.

B. A subsequent change in applicable law does not excuse a voluntary choice not to appeal

1. It has long been settled doctrine that a change in the judicial view of applicable law affords no ground for a motion to vacate a final judgment entered before announcement of that change. See, *e.g.*, *Scotten* v. *Littlefield*, 235 U.S. 407, 410–411; *United States* v. *Kunz*, 163 F. 2d 344, 346 (C.A. 2); *United States* v. *Borchers*, 163 F. 2d 347, 350 (C.A. 2); *Lehman Co.* v. *Appleton Toy & Furniture Co.*, 148 F. 2d 988, 989 (C.A. 7). As this Court stated in *Simmons Co.* v. *Grier Bros. Co.*, 258 U.S. 82, 88, it is an ancient rule of equity

practice that "a change in the authoritative rule of law, resulting from a decision by this court announced subsequent to the former decree, neither demonstrates an 'error of law apparent' upon the face of that decree nor constitutes new matter *in pais* justifying a review." Under the 1948 amendment to Rule 60(b) which abolished the historic ancillary remedies of common law and equity previously used to attack civil judgments[15] and incorporated the substance of these remedies in the various subsections of Rule 60(b),[16] this same legal principle has been uniformly held to control.

The issue whether a change in applicable law excuses, for purposes of Rule 60(b), a decision not to appeal was involved in the *Ackermann* case, *supra*. Following the judgments of denaturalization entered against the Ackermanns and Keilbar, this Court decided in *Baumgartner* v. *United States*, 322 U.S. 665, that evidence of attachment and loyalty to a foreign government at a date subsequent to naturalization has little force in establishing the falsity of the earlier oath of exclusive allegiance to the United States, a finding which significantly weakened the trial court's determination of the Ackermanns' denaturalization. Although the Ackermanns emphasized this change of law in their Rule 60(b) motion to show that the denaturalization determination was

[15] *Coram nobis*, *coram vobis*, *audita querela*, bill of review, and bill in the nature of a bill of review were the remedies abolished.

[16] The background and purpose of the 1948 amendment is discussed in detail in 7 Moore, *Federal Practice* (2d ed., 1955), pp. 220–221, 513–516.

erroneous,[17] this Court did not find that such change of law was sufficient to overcome the Ackermanns' voluntary choice not to appeal. The judgment of denaturalization was upheld even though the government had stipulated in the court of appeals on the basis of *Baumgartner* to a reversal of the judgment of denaturalization against Keilbar, who had appealed. *Keilbar* v. *United States, supra.*[18] See also the discussion of *Sunal* v. *Large, supra,* pp. 23–24.

Similarly, in *Title* v. *United States,* 263 F. 2d 28, 30–31 (C.A. 9), certiorari denied, 359 U.S. 989, a motion was made under Rule 60(b) against a judgment of denaturalization on the ground that an affidavit of good cause was never filed in the denaturalization proceedings and thus rendered the denaturalization judgment invalid in light of subsequent decisions of this Court.[19] The defendant had filed a notice of appeal which had thereafter been dismissed for failure to prosecute. In denying the relief sought

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[17] Petition, p. 11, Nos. 35–36, Oct. Term, 1950. No brief was filed by the Ackermanns on the merits.

[18] To the same effect in a proceeding by way of bill of review before the 1948 amendment, see *United States* v. *Kunz,* 163 F. 2d 344 (C.A. 2), where a defendant who had failed to appeal a judgment of denaturalization also sought to invoke the benefits of *Baumgartner,* which had been decided after such judgment was entered. The Second Circuit said: "[Defendant] cannot now employ a bill of review as a substitute for an appeal even on the ground that the Supreme Court in the *Baumgartner* case had changed what was supposed to be the law." *Id.,* p. 346.

[19] *United States* v. *Zucca,* 351 U.S. 91; *Matles* v. *United States,* 356 U.S. 256.

under Rule 60(b), the court of appeals said (*id.*, pp. 30, 31):

> Were Title's *appeal* presently before us, we would reverse the judgment of denaturalization rendered against him by the district court. But that appeal he has voluntarily failed to prosecute. He is in the same status as any other individual who fails to protect fully his valid legal rights, by neglecting to perfect his appeal.
>
> * * * * *
>
> Rule 60(b) was not intended to provide relief for error on the part of the court or to afford a substitute for appeal. * * * Nor is a change in the judicial view of applicable law after a final judgment sufficient basis for vacating such judgment entered before announcement of the change.

In *Annat* v. *Beard*, 277 F. 2d 554 (C.A. 5), pending on a petition for a writ of certiorari, No. 262, this Term, the government brought a condemnation suit against a number of landowners involving common issues of law. While several of the landowners appealed from the district court's decision for the government, Mrs. Annat chose not to do so. Since the landowners who had appealed had been successful (*Paradise Prairie Land Co.* v. *United States*, 212 F. 2d 170 (C.A. 5)), the Fifth Circuit assumed that the condemnation judgment was erroneous. Nevertheless, the court held that Mrs. Annat's only remedy was appeal and therefore she could not seek relief from the judgment under Rule 60(b)(6). Accord: *Elgin National Watch Co.* v. *Barrett*, 213 F. 2d 776, 779–780

(C.A. 5); *Collins* v. *City of Wichita*, 254 F. 2d 837 (C.A. 10); *Berryhill* v. *United States*, 199 F. 2d 217 (C.A. 6); *United States* v. *Failla*, 146 F. Supp. 307, 313 (D. N.J.); *Louke* v. *United States*, 21 F.R.D. 305, 308 (S.D. N.Y.).

Petitioner seeks to escape the "change of law" rule of the *Ackermann* decision by emphasizing that the legal climate when he dismissed his appeal was such as to render the continuation of litigation on his part a hopeless and futile act. He says that the decision in *Sweet* v. *United States*, 211 F. 2d 118, in the Sixth Circuit and this Court's subsequent denial of certiorari, 348 U.S. 817, "settled the law of Petitioner's case" and, as a practical matter, rendered an appeal futile (Pet. Br. 24, 28).[20] But precisely the same legal climate did not stay *Nowak* and *Maisenberg* (who were represented by the same counsel as petitioner) from perfecting their appeals to the Sixth Circuit. Nor were they stayed by the adverse decisions in that circuit from seeking review in the Supreme Court. In light of their victories, the claim by petitioner that for him to have pressed his appeal to decision would have been a useless and unavailing act and that consequently his decision not to appeal was not made voluntarily seems hardly accurate. But even if petitioner were correct, his claim amounts to no more than that the applicable law which once was clearly in favor of the government's position

[20] Of course, a denial of certiorari by this Court "import[s] no expression of opinion on the merits." *Sunal* v. *Large*, *supra*, 332 U.S. at 181; see *House* v. *Mayo*, 324 U.S. 42, 48.

was subsequently changed; thus, petitioner cannot escape the clear implication of the *Ackermann* decision. The short answer is that "since [petitioner] chose not to pursue the remedy which [he] had * * * [he] should [not] be allowed to justify [his] failure by saying [he] deemed any appeal futile." *Sunal* v. *Large, supra,* 332 U.S. at 181.[20a]

2. Petitioner cannot, as he seeks to do, rely upon the language of clause (5) of Rule 60(b) providing for relief when "it is no longer equitable that the judgment should have prospective application". That language applies to the prospective features of a judgment, not the original decree. For example, the rule applies where conditions arising subsequent to the issuance of a continuing injunction are such as warrant modification. The prospective effects of the judgment here, however, consist wholly of consequences that flow from that part of the judgment of denaturalization which revoked the order of naturalization and cancelled the certificate of citizenship. As this Court said in *United States* v. *Swift & Co.,* 286 U.S. 106, 119, in recognizing the underlying principle of subdivision (5): "The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting." Cf. 7 Moore, *Federal Practice* (2d ed., 1955), pp. 288–289. However he may phrase it, petitioner is,

[20a] As pointed out in Point II, *infra*, we deny, in any event, that this case is the same as *Nowak* and *Maisenberg* or would be controlled by them on the merits.

in effect, seeking a reversal of the original judgment, not a true readjustment.

For this reason petitioner's reliance (Pet. Br. 28–29) upon *McGrath* v. *Potash*, 199 F. 2d 166 (C.A. D.C.), is misplaced. In that case the defendant obtained a permanent injunction, essentially prospective in nature and application, restraining the government from conducting a deportation proceeding not in accord with the provisions of the Administrative Procedure Act. Thereafter, Congress decreed that deportation proceedings should not be subject to the hearing provisions of that Act. In view of the fact that this subsequent statutory change rendered the prospective decree inequitable, the court of appeals ordered it dissolved. The *Potash* case thus presents the classic situation warranting Rule 60(b)(5) relief—*i.e.*, one in which a prospective order required readjustment because of radically changed conditions. It is wholly unlike this case where the continuing force of the decree derives from facts fully accrued and litigated in the original judgment.

3. The basic consideration of this case is the long-standing policy of the law to protect the finality of judgments. See *Collins* v. *City of Wichita*, 254 F. 2d 837, 839 (C.A. 10); *Berryhill* v. *United States*, 199 F. 2d 217, 219 (C.A. 6); *United States* v. *Failla*, 164 F. Supp. 307, 315 (D. N.J.). As the Court explained in *Sunal*, 332 U.S. at 182:

> It is not uncommon after a trial is ended and the time for appeal has passed to discover that a shift in the law or the impact of a new de-

> cision has given increased relevance to a point made at the trial but not pursued on appeal. * * * If in such circumstances, *habeas corpus* could be used to correct the error, the writ would become a delayed motion for a new trial, renewed from time to time as the legal climate changed. * * *. Wise judicial administration of the federal courts counsels against such a course * * *.

These considerations are no less applicable in a civil case. A contrary doctrine would mean that whenever this Court or a court of appeals overruled or modified a prior decision, or crystallized the law, every lower-court judgment not in conformity with the new decision would be subject to reexamination. Under such a doctrine there would be uncertainty and confusion rather than responsibility and definiteness in litigation. "Litigation must end some time, and the fact that a court may have made a mistake in the law when entering judgment, or that there may have been a judicial change in the court's view of the law after its entry, does not justify setting it aside". *Collins* v. *City of Wichita, supra,* 254 F. 2d at 839. "[T]he policy of the law is to protect the finality of judgments, not only for the benefit of the interests and rights of the litigants, but in the public interest in expeditious disposition of litigation." *United States* v. *Failla, supra,* 164 F. Supp. at 315. And as this Court said simply but very definitely with respect to the stronger factual contentions made in *Ackermann, supra,* 340 U.S. at 198: "There must be an end to litigation someday * * *."

II

IN ANY EVENT, THE JUDGMENT CANCELLING PETITIONER'S CITIZENSHIP WAS PROPER

We have argued in the preceding portion of this brief that petitioner's voluntary, deliberate, decision to dismiss his appeal precludes his present attempt to obtain relief under Rule 60(b). In this portion of the brief we argue that, even if petitioner had standing, under the Rule, the judgment of denaturalization was correct because petitioner's admitted membership in the Communist Party in the ten-year period preceding his naturalization in 1942 rendered his naturalization illegal under the Nationality Act of 1940, 54 Stat. 1137. As we discuss below, the 1940 Act contained a provision which was specifically designed to, and effectively did, make persons who had been members of the Communist Party within the preceding ten years ineligible for naturalization. Therefore, petitioner's naturalization was properly cancelled on the ground of illegal procurement under the 1940 Act because he was ineligible for citizenship when he was naturalized in 1942 under the 1940 Act.

A. Petitioner was ineligible for naturalization at the time he was naturalized in 1942

1. *The evidence conclusively showed that petitioner had been, within the ten years preceding his naturalization, a member of an organization advocating the overthrow of the government by force and violence and thus was barred from citizenship under Section 305 of the Nationality Act of 1940*

Section 305 of the Nationality Act of 1940, declared that "[n]o person shall hereafter be naturalized as a citizen of the United States" if such person had been within ten years preceding his application for citizen-

ship a member of an organization advocating forcible or violent overthrow of the Government of the United States. After reviewing the evidence introduced by the government at petitioner's denaturalization trial, the district court concluded, *inter alia,* that the evidence was "clear, unequivocal and convincing" that petitioner who was naturalized in 1942 had been a member of the Communist Party within the ten years immediately preceding his petition for naturalization, and that, during petitioner's membership, the Communist Party advocated the overthrow by force and violence of the Government of the United States (R. 176–181). "For these reasons," the court said, the "government must prevail on the jurisdictional question that defendant was not eligible to become a citizen when he filed his naturalization petition or when he took the oath, because admittedly, within the ten-year statutory period, he had been a member of the Communist Party of the U.S., an organization that advised, advocated, or taught overthrow of this government by force and violence" (R. 181).

As described in the Statement, *supra,* pp. 5–7, the evidence of petitioner's membership in the Communist Party rests on his own testimony to that effect, as well as the testimony of government witnesses. According to petitioner, he was a member of the Communist Party from 1931 to 1938 and attended closed meetings about once a month. He further testified that he was a member of the Bureau of the Greek Fraction of the Party in Detroit, and was at one time its Secretary. Moreover, while he left the Party in 1938, he said this was not because of any dispute or

difference with its aims and objectives, but because of a directive put out by the Party leadership that all aliens resign. In fact, he stated that he still believed in the aims and objectives of the Party when he was naturalized in 1942.

Leo Syrakis testified that petitioner introduced him into the Party in 1935, and that, in that year, petitioner was the director of all Greek activities in the Party in Michigan and the one empowered to educate all of the members of the units in Communism. The testimony of William Nowell corroborated the fact that in the middle 1930's petitioner was a "high functionary" of the Party. In sum, as the trial court found, petitioner held "offices of trust and responsibility in the Party during the years 1931 through 1938" (R. 183). And Syrakis and Nowell testified that petitioner personally advocated forceful and violent overthrow (see R. 123–124, 126, 132, 165–166).[21]

This is therefore not a case of accidental or artificial membership during the statutorily proscribed period. Rather, petitioner's membership was, at the very least, a knowledgeable and purposeful association with the Communist Party as a distinct and active political entity. Such membership would clearly meet the deportation standard which has been laid down by the Court (*Galvan* v. *Press,* 347 U.S. 522; *Rowoldt* v. *Perfetto,* 355 U.S. 113; *Niukkanen*

[21] But while such advocacy in itself made petitioner ineligible for naturalization under Section 305 of the Act, this was not the ground on which the finding of illegality of the district court was based (R. 176–180).

v. *McAlexander,* 362 U.S. 390), and surely was sufficient to constitute "membership" which disqualified an alien from naturalization benefits under Section 305 of the Nationality Act of 1940.

Secondly, there was clear and convincing proof adduced at trial that the Communist Party, during petitioner's membership, was an organization which advocated the forcible and violent overthrow of the Government of the United States. The district court so found after carefully examining the evidence (R. 176–180), and petitioner does not contest this finding here.[22] See *Harisiades* v. *Shaughnessy,* 342 U.S. 580, 584.

Accordingly, the evidence conclusively established that, within ten years prior to petitioner's naturalization in 1942, he had been a member of an organization which advocated the violent overthrow of the Government of the United States. He was therefore ineligible for naturalization under Section 305.

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[22] The evidence as to the illegal aims of the Party is summarized at R. 199–200, and is set out in the opinion of the district court at R. 177–180. The statement in *Schneiderman* v. *United States,* 320 U.S. 118, 157, that it was a tenable conclusion that "the Party in 1927 desired to achieve its purpose by peaceful and democratic means * * *" is not dispositive of the nature of the Communist Party in 1931–1938. See *Yates* v. *United States,* 354 U.S. 298, 336–337, where this Court said: "The Court in *Schneiderman* certainly did not purport to determine what the doctrinal content of 'Marxism-Leninism' might be at all times and in all places. Nor did it establish that the books and pamphlets introduced against Schneiderman in that proceeding could not support in any way an inference of criminality, no matter how or by whom they might thereafter be used."

2. *The legislative history of the Nationality Act of 1940 confirms that members of the Communist Party were rendered ineligible for citizenship under that Act.*

That the unequivocal bar to citizenship established by Section 305 was meant to preclude citizenship to a member of the Communist Party—*i.e.*, that the Party was, in the judgment of Congress, an organization which advocated forcible and violent overthrow—is made clear by the legislative history of the 1940 Act.

The original draft of the Nationality Act of 1940, as first considered by the Committee on Immigration and Naturalization of the House of Representatives,[23] contained no express language prohibiting citizenship to aliens advocating violent and forcible overthrow, or to those who were members of organizations having such illicit objectives. As originally drafted, that section was, in its basic tenor, simply a carry-over of the provision contained in the then existing law (Section 7 of the 1906 Act, 34 Stat. 598). As Henry B. Hazard, Administrative Assistant to the Commissioner of Immigration and Naturalization, explained to the Committee: "Section 305 is the same as present law, which prohibits the naturalization of persons with anarchistic ideas. It is almost word for word a copy of the present statute." *Hearings,* p. 68; see also *id.*, pp. 121–122. Almost immediate concern at what several members of the Committee deemed to be its "hazy" and "negative" language (*id.*, pp. 304–305)

[23] *Hearings Before the Committee on Immigration and Naturalization, House of Representatives, on H.R. 6127, as superseded by H.R. 9980, to Revise and Codify the Nationality Laws of the United States* [hereinafter *Hearings*], 76th Cong., 1st Sess.

led to a desire to redraft Section 305 completely, as Congressman Mason put it, to insert "proper language to shut out Communists" (*id.*, p. 305). Just prior to the close of the hearings on May 13, 1940, this purpose was expressed, as follows (*id.*, pp. 321–322):

> Mr. REES. There is an instruction to provide an amendment to cover section 305.
>
> Mr. VAN ZANDT. We want an amendment in there to take care of Communists and those who advocate the overthrow of the Government.
>
> * * * * *
>
> The CHAIRMAN [CONGRESSMAN DICKSTEIN] * * * Without objection the amendment will include Communists and also Fascists and Nazis and any others who advocate attempting to overthrow the Government.

The next day, in accord with this express purpose, Congressman Rees, at an executive session of the Committee, submitted an amendment which embodied the essential features of Section 305 as it was finally adopted. *Hearings*, p. 327. The Committee's explanation of this provision shows that its aim was to prohibit the naturalization of Communists, Nazis, and Fascists. *Id.*, pp. 328–331. As Chairman Dickstein construed the amendatory language, it was "in addition to and not in substitution of the law. Therefore, you are getting something more than what the present law is. I think you covered all the ground. I think this amendment should be adopted because that will cover all of the multitude of discussions you had this morning" (*id.*, p. 329).

The bill as considered by Congress included this new provision. Although there was little debate in either

House on Section 305, what there was emphasized the fact that one of its principal purposes was to preclude the naturalization of Communists. On the floor of the House, Congressman Rees, who had drafted the new Section 305, when called on to explain it stated (86 Cong. Rec. 11949):

> The old law denies citizenship to anarchists, believers in polygamy, and some other classes. *Under this bill, we believe we have covered the question of fascism, nazi-ism, communism, or any other "ism" although they are not specifically mentioned by name.* [Emphasis added.]

Similarly, the Committee Reports which accompanied the bill as finally adopted (H.R. 9980) re-emphasized the broadened exclusionary purpose of this provision. The Senate Committee on Immigration observed that "[a] particularly desirable feature of the code is the broadening of the prohibition against the naturalization of persons who are members of anarchistic or other subversive groups or who believe in, or advocate, subversive doctrines or sabotage. This provision would be applicable to any person who within 10 years prior to filing a petition for naturalization has entertained any such views or has been affiliated with any organization or group of a subversive nature." S. Rept. No. 2150, 76th Cong., 3d Sess., p. 3; see also H. Rept. No. 2396, 76th Cong., 3d Sess., p. 2.

The language and legislative background of Section 305 further make plain that, contrary to petitioner's contention (Pet. Br. 17–18), Congress did not mean to limit the exclusionary reach of Section 305 to those members with personal "knowledge" of the organiza-

tions illicit purposes. The legislative history indicates that, while Congress considered imposing such a requirement, it decided against it. *Hearings*, p. 394. Indeed, the absence of any such requirement is plain from the internal structure of Section 305 itself. By its express terms, it excluded from citizenship *both* those who personally advocated overthrow by force and violence and those who were members of organizations having such unlawful objectives. If Congress intended that proof of personal advocacy be required in both situations, then the clause relating to "membership" would be meaningless surplusage. As the Senate Report quoted above emphasizes, Section 305 was meant to cover those who personally "entertained" proscribed aims, as well as those "affiliated" with, or "members" of, an organization whose objectives were illegal. Furthermore, the critical language of Section 305 of the 1940 Act is the same as, and was probably taken from, the language of the deportation provisions of the then Registration Act of 1940 (passed a few months earlier) which the Court has held does not require personal knowledge of the Party's unlawful objectives. *Harisiades* v. *Shaughnessy*, 342 U.S. 580; *Galvan* v. *Press*, 347 U.S. 522, 525–528.

The sum of it is that Congress in Section 305 of the Nationality Act of 1940 intended (1) that *membership* in an organization advocating forcible and violent overthrow be a complete bar to the attainment of citizenship, without proof that the applicant for citizenship personally advocated or endorsed the organization's illegal objectives and (2) that the Communist

Party be considered to be such an organization advocating forcible and violent overthrow. Petitioner, as a person who had been a member of the Communist Party within ten years preceding his application for citizenship in 1942, was therefore ineligible for naturalization.

B. The naturalization of a person who was ineligible for citizenship when naturalized could properly be cancelled on the ground of illegal procurement under the 1940 Act

1. It is well established that, where Congress has provided for cancellation of a certificate of naturalization on the ground that it has been illegally procured,[24] the certificate may be cancelled upon proof, without more, than the alien was ineligible when naturalized. This Court has consistently ruled in a variety of situations, involving less crucial conditions for naturalization than the one present here, that the certificate is cancellable on the basis of illegal procurement unless there is strict compliance with the conditions Congress has imposed as pre-requisites to an award of citizenship. See, *e.g., Maney* v. *United States,* 278 U.S. 17; *United States* v. *Ness,* 245 U.S. 319; *United States* v. *Ginsberg,* 243 U.S. 472; *Luria* v. *United States,* 231 U.S. 9, 24; *Johannessen* v. *United States,* 225 U.S. 227, 240; *Tutun* v. *United States,* 270 U.S. 568, 578; *Schwinn* v. *United States,* 311 U.S. 616; cf. *Harisiades* v. *Shaughnessy,* 342 U.S. 580, 585, note 5. In *United States* v. *Ginsberg, supra,* a certificate of naturalization was cancelled because the hearing was held in

[24] Under the Immigration and Nationality Act of 1952, illegal procurement is no longer a specific basis for cancellation of a certificate of naturalization.

chambers, rather than in open court. The Court said (243 U.S. at 475):

> No alien has the slightest right to naturalization unless all statutory requirements are complied with; and every certificate of citizenship must be treated as granted upon condition that the Government may challenge it as provided in § 15 and demand its cancellation unless issued in accordance with such requirements. If procured when prescribed qualifications have no existence in fact it is illegally procured * * *.

It would be strange indeed to apply this rule of cancellation to the failure to file a certificate of arrival (*United States* v. *Ness*, 245 U.S. 319), to noncompliance with the residence requirement (*Johannessen* v. *United States*, 225 U.S. 227), and to the holding of the naturalization hearing in an improper place (*United States* v. *Ginsberg*, 243 U.S. 472), and yet not apply it to the case where the alien obtaining the certificate was a member of a class specifically debarred from citizenship as a result of Congress' grave concern for the safety of the nation at a time (October 1940) when a "world war was threatening to involve us." Cf. *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 590, discussing the same conditions which motivated the adoption of the Alien Registration Act of 1940 in June 1940. Stated in other words, citizenship was illegally procured where, within the ten years immediately preceding his petition for citizenship under the Nationality Act of 1940, an applicant for citizenship was a member of the Communist Party and thus within the class excluded from citizenship by Congress. Under the complete and exclusive authority

over naturalization which is expressly provided in the Constitution (Art. I, § 8, Cl. 4) and which has long been recognized by this Court (*e.g., Maney* v. *United States,* 278 U.S. 17, 23; *Tutun* v. *United States,* 270 U.S. 568, 578); *United States* v. *Macintosh,* 283 U.S. 605). Congress had the power to provide that a certificate thus illegally procured should be cancelled.

2. The decision of this Court in *Schneiderman* v. *United States,* 320 U.S. 118, is not inconsistent with applying the doctrine of illegal procurement to this case. There, denaturalization proceedings had been instituted in 1939 to cancel a certificate obtained in 1927 under the Nationality Act of 1906, which did not specifically prohibit citizenship to members of organizations advocating overthow of the government by force and violence. The complaint charged that the certificate had been illegally procured in that the applicant was not, at the time of his naturalization and during the preceding five years, a person attached to the principles of the Constitution since he was then a member of, and a believer and supporter of the principles of, certain Communist organizations which advocated overthrow of the Government of the United States by force and violence. The Court was considering the situation in which illegality was predicated upon the claim that the personal attitude of the applicant, despite the favorable testimony of the requisite witnesses and the finding of the naturalization court, was irreconcilable with the requirement of attachment to the principles of the Constitution. It was against this background of attempted cancellation because of personal belief that the Court questioned

whether the government could re-examine the naturalization court's determination by means of an illegal procurement charge. See 320 U.S. at 124. As a matter of fact, the Court assumed that a certificate could be set aside under Section 15 of the 1906 Act on the basis of illegal procurement, holding merely that the government had failed in its proof. *Id.*, pp. 124–125. On this theory of illegality based on lack of attachment to the principles of the Constitution, it had to be shown that Schneiderman himself had the belief in violent overthrow which was incompatible with the principles of the Constitution. The government's position was that such personal belief could be found from Schneiderman's membership and position in the Party on the theory that his membership and position would not have been possible without belief in violent overthrow. As this Court emphasized, however, the government's case failed because it was based entirely upon "the admitted infirmities of proof by imputation." *Id.*, p. 154; see also *id.*, p. 146.

In contrast, in this case where citizenship was acquired despite the express proscription of Section 305 of the 1940 Act, no such "infirmities of proof" exist. There is no need to proceed by inference or imputation. The test is not lack of attachment which the government attempts to show by inferring personal advocacy of force or violence from membership in the Communist Party; instead, the question is simply whether petitioner was a member of a particular kind of organization. Congress, by Section 305, excluded from citizenship those aliens who had belonged to an organization advocating the violent over-

throw of the government, whether or not the alien personally advocated such violent overthrow, because it believed that to grant citizenship to members of that class would be detrimental to the best interests of the United States. All that was required to establish illegal procurement and to permit cancellation of naturalization was proof of membership in an organization embraced within the excluded class—*i.e.*, one which advocated forcible and violent overthrow of the Government of the United States. In this case, membership in the Party was made abundantly plain by the evidence adduced at petitioner's denaturalization trial, and the finding that the Party was a prescribed organization is not challenged (see *supra*, pp. 5–7, 36–37).

Moreover, the condition upon which the charge of illegal procurement was premised in Schneiderman was significantly different from that involved in this case. The Schneiderman condition could fairly be interpreted as satisfied when the naturalization court made a finding of attachment. Mr. Justice Douglas, concurring in that case (320 U.S. at 162–163), stated that the pertinent language of the 1906 Act,[25] "made the *finding* the condition precedent [to naturalization], not the weight of the evidence

[25] Subdivision *Fourth* of Section 4 of the 1906 Act, at the time when Schneiderman was naturalized, provided in pertinent part:

"*It shall be made to appear to the satisfaction of the court admitting any alien to citizenship* that immediately preceding the date of his application * * * he has behaved as a man * * * attached to the principles of the Constitution of the United States * * *." (Emphasis added.)

underlying the finding" (emphasis added). *Ibid.* Indeed, he contrasted that type of pre-requisite with the unyielding sort of condition going to the very core of the naturalization decree, the "so-called 'jurisdictional' fact 'upon which the grant is predicated' " (*id.*, p. 163):

> If an anarchist is naturalized, the United States may bring an action under § 15 to set aside the certificate on the grounds of illegality. Since Congress by § 7 of the Act forbids the naturalization of anarchists, the alien anarchist who obtains the certificate has procured it illegally whatever the naturalization court might find. The same would be true of communists if Congress declared they should be ineligible for citizenship. Then proof that one was not a communist and did not adhere to that party or its belief would become like other express conditions in the Act a so-called "jurisdictional" fact "upon which the grant is predicated" [citing *Johannessen* v. *United States*, 225 U.S. 227, 240].

It is precisely the kind of condition adverted to by Mr. Justice Douglas that is involved here. Congress by the 1940 Act clearly meant to bar members of the Communist Party from citizenship. That one who fell within this prohibition was, in fact, naturalized did not mean that, as to him, the Congressional condition had no application or that it was waived or satisfied. Rather, as the district court concluded here, the granting of the certificate in such a case would amount to a "jurisdictional defect," and citizenship so acquired would be subject to cancellation. As Mr. Jus-

tice Holmes phrased the underlying rationale of the doctrine of illegal procurement in *Maney* v. *United States*, 278 U.S. 17, 23, in upholding a denaturalization for failure to file the certificate of arrival at the time of filing the petition for naturalization, "a record that discloses on its face that the judgment transcends the power of the judge may be declared void in the interest of the sovereign who gave to the judge whatever power he had." Surely, if non-compliance with an express Congressional directive warranted the cancellation in *Maney*, by the same token to have granted citizenship to one barred under Section 305 of the 1940 Act "transcend[ed] the power of the judge [and] may be declared void". Any other conclusion would do violence to the express Congressional purpose and disregard the accepted view of this Court that a naturalization court cannot exercise powers beyond those granted it by Congress.

The *Schneiderman* decision therefore did not affect the long-standing rule that Congress may fix the conditions and qualifications of citizenship. Where Congress has imposed, as it did in the 1940 Act, an express bar on the acquisition of citizenship by members of organizations which advocated forceful and violent overthrow of the government (*i.e.*, a "jurisdictional" condition), an action to cancel citizenship acquired despite that prohibition was available to vindicate the Congressional purpose.[26]

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[26] Consequently, we think the recent district court decision in *United States* v. *Richmond*, N.D. Cal., Civil No. 31995, decided November 19, 1959, is erroneous. In that case it was held that a denaturalization action cannot be maintained unless there was

3. Our discussion of *Schneiderman* also disposes of the claim of petitioner's extended argument (Pet. Br. 12–24) that this case is indistinguishable from *Nowak* v. *United States*, 356 U.S. 660, on the issue of illegal procurement.[27] Unlike petitioner, who had been naturalized under the Nationality Act of 1940, but like Schneiderman, Nowak had been naturalized under the Nationality Act of 1906, which did not, in terms, prohibit citizenship to members of organizations advocating overthrow of the government by force and violence. As a consequence, the charge of illegal procurement against Nowak was not and could not have been predicated on the ground that, when he acquired citizenship, he was a member of a class which Congress had barred from citizenship—the theory relied on here. The theory of *Nowak* was precisely the same as that in *Schneiderman*. The specific issue was whether the condition of attachment to the principles of the Constitution of the United States was irreconcilable with Nowak's Communist

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some evidence of the Section 305 ineligibility before the naturalization judge from whom the certificate was obtained. The court's error is that it makes the validity of the action turn on whether there was any evidence in the original proceeding to show that the naturalization judge's determination was wrong. The true criterion, as we have discussed above, is whether the court was in fact acting without the power granted by Congress. If it was, then regardless of the evidence it relied upon, such certificate is subject to cancellation because the naturalization court was without jurisdiction to grant naturalization.

[27] *Maisenberg* v. *United States*, 356 U.S. 670, also relied upon by petitioner, did not involve the question of illegal procurement at all since cancellation was there sought under the Immigration and Nationality Act of 1952, 66 Stat. 163, 260, which does not make illegal procurement a ground for denaturalization.

Party membership. Even assuming that non-attachment could be proved in this indirect manner (cf. *Schneiderman* v. *United States*, 320 U.S. 118, and our discussion *supra*, pp. 44–48), the government had to sustain a two-fold burden of proof. It had to establish first the illegal objectives of the Party as defined by the statute and second that the defendant-member was aware of and endorsed the Party's illegal advocacy. Finding that the government's evidence on this latter element of its case fell short of meeting the "clear and convincing" test, this Court held that it had failed to prove its charge, despite the fact that the evidence did show that Nowak was an "active member" and "functionary" of the Party. 356 U.S. at 666–667.

A totally different set of circumstances is presented by this case. While the cancellation suits against both Polites and Nowak were instituted under the 1940 Act, citizenship by each had been acquired under different statutory schemes, imposing different conditions and obligations. To denaturalize Nowak, who had acquired citizenship under the 1906 Act, proof of personal knowledge and personal advocacy of violent overthrow was necessary to establish that he had failed to meet the pre-requisite of attachment when naturalized. In this case, where citizenship was acquired under the 1940 Act, illegality was established by a direct showing that petitioner was a meaningful and active member of the Communist Party and that the Party advocated forcible and violent overthrow at the time of his admitted membership (1931–1938). These findings were not merely pre-

liminary to proof of personal knowledge and advocacy from which, it was claimed, an inference could be drawn of lack of attachment. These two elements—meaningful membership in the Party and the Party's unlawful objectives—which were merely building blocks in *Nowak* and *Schneiderman*, were the complete proof necessary to sustain the illegal procurement charge here.[28] This was the holding in *Chomiak* v. *United States*, 108 F. Supp. 527 (E.D. Mich.), affirmed, 211 F. 2d 118, 119–120 (C.A. 6), certiorari denied, 348 U.S. 817, which led petitioner to abandon his appeal. The validity of that decision has not been affected by this Court's ruling in *Nowak* v. *United States*, 356 U.S. 660. Petitioner's prior view that the ruling in *Chomiak* and *Sweet* governed his case was correct then and, contrary to petitioner's present position, it governs his case now.

In sum, Congress in the Nationality Act of 1940 adopted, as a basic pre-requisite to the acquisition of citizenship, the requirement that the applicant not be a member of the Communist Party at any time within ten years immediately preceding his petition for naturalization. Where, despite this mandatory prohibition, a member of the Communist Party, like peti-

[28] Petitioner cannot properly rely, as he seeks to (Pet. Br. 22), upon this Court's observation in *Nowak*, *supra*, 356 U.S. at 668, that "Congress in the Nationality Act of 1940 did not make membership or holding office in the Communist Party a ground for loss of citizenship." For this statement simply reenforced the Court's finding that a person naturalized under the 1906 Act could not be denaturalized under the 1940 Act for failure to meet a condition which was not in the earlier legislation, but was adopted by Congress long after his naturalization.

SUPREME COURT OF THE UNITED STATES

No. 25.—October Term, 1960.

Gus Polites, Petitioner, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[November 21, 1960.]

Mr. Justice Stewart delivered the opinion of the Court.

Petitioner is a native of Greece who came to this country in 1916. In 1942 he became a naturalized citizen by decree of the United States District Court at Detroit, under the provisions of the Nationality Act of 1940.[1] In 1952 the United States brought proceedings under § 338 (a) of the 1940 Act to revoke his citizenship.[2] These proceedings culminated in a judgment of denaturalization, 127 F. Supp. 768. An appeal from that judgment was docketed in the Court of Appeals for the Sixth Circuit. Subsequently, under circumstances to be related, counsel for the petitioner stipulated to dismissal of the appeal with prejudice, and the appeal was dismissed in accordance with the stipulation. Four years later the petitioner brought the present action to vacate the judgment of denaturalization, relying upon Rule 60 (b), Fed.

[1] 54 Stat. 1137.

[2] Section 338 (a) of the Nationality Act of 1940, 54 Stat. 1158–1159, provided: "It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings . . . for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured."

Rules Civ. Proc.[3] The District Court denied the motion, 24 F. R. D. 401, and the Court of Appeals affirmed, 272 F. 2d 709. Certiorari was granted to consider the availability of Rule 60 (b) relief in the circumstances here presented, 361 U. S. 958.

Section 305 of the Nationality Act of 1940 provided that no person should be eligible for naturalization who at any time within ten years preceding his application had been a member of any organization that advocated the overthrow by force or violence of the Government of the United States.[4] The Government's complaint in the 1952 denaturalization proceedings charged that the petitioner's citizenship had been illegally procured because within ten years immediately preceding his application for naturalization he had been a member of the Communist Party of the United States, an organization which, it was alleged, advised, advocated, or taught the over-

[3] The provisions of Rule 60 (b) upon which the petitioner relied are as follows: "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (5) . . . it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment."

[4] "No person shall hereafter be naturalized as a citizen of the United States—

"(b) Who believes in, advises, advocates, or teaches, or who is a member of or affiliated with any organization, association, society, or group that believes in, advises, advocates, or teaches—

"(1) the overthrow by force or violence of the Government of the United Staates or of all forms of law; . . .

"The provisions of this section shall be applicable to any applicant for naturalization who at any time within a period of ten years immediately preceding the filing of the petition for naturalization is, or has been, found to be within any of the classes enumerated in this section, notwithstanding that at the time petition is filed he may not be included in such classes." 54 Stat. 1141.

throw by force and violence of the Government of the United States.[4]

At the denaturalization hearing the petitioner, who was represented by counsel, testified that he had been a member of the Communist Party of the United States from "around" 1931 until 1938. He stated that he had attended closed Party meetings about once a month, that he had been secretary of the "Greek Fraction" of the Party in Detroit, and that he had left the Party in 1938 only because of a directive that all aliens resign from the Party at that time. Other witnesses described the petitioner as a "high functionary" of the Party, who at closed meetings had advocated the overthrow of existing government by force and violence.[5]

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[4] The complaint also alleged that the petitioner had obtained his naturalized citizenship fraudulently.

[5] The following are illustrative examples of such testimony:

"Q. What was his statement? What did he say?

"A. He say the way to organize, agitate—agitate the workers, organize them, in order to follow up when the time comes to overthrow the government by force and violence.

"Q. Did he ever say in your presence the methods that he was going to use?

"A. Well, the only method he said was by force. He said that we, the workers, would never be able to get in the Government by vote.

"Q. This was April and May, 1935. What did he say?

"A. We had this campaign for the bi-weekly paper, and he spoke very ardently to the members that we had to go ahead and subscribe and get the money that we supposed to collect in order to reach them workers and wait in our movement until the time comes when we would be able to overthrow the present government by force and violence.

"Q. And you heard him say that at a Greek Fraction meeting?

"A. Yes.

"Q. Do you know of your own knowledge what positions the

Based upon this and other testimony, the District Court found that the Government had proved by clear, unequivocal, and convincing evidence that the petitioner had been a member of the Communist Party of the United States within the statutory period, and that the Party was an organization which "was then advising, advocating, or teaching forcible or violent overthrow of this government." 127 F. Supp., at 770. Accordingly, the court held that the petitioner had illegally procured his citizenship, because he had not been eligible to become a citizen at the time his certificate of naturalization was issued.[7] A judgment cancelling the petitioner's citizenship was entered, 127 F. Supp. 768, 770–772.[8]

From this judgment the petitioner promptly appealed to the United States Court of Appeals for the Sixth Cir-

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defendant, Guss Polites, held in the Communist Party during that period of time?

"A. Not all of the positions. I do know that he was a member of the Fraction Bureau of the Greek Fraction, and my recollection is that he was Secretary of that Fraction for a time. At least, he was a high functionary and attended functionary meetings.

"A. He has, in speeches, advocated the overthrow of the government by force and violence, during my presence."

[7] In connection with the issue of fraudulent procurement, the court also found that the Government had proved by clear, unequivocal, and convincing evidence that the petitioner had personally known that the Communist Party of the United States was an organization advocating overthrow of this Government by force and violence. 127 F. Supp. 768, 772–773.

[8] The court also found that the petitioner had procured his citizenship fraudulently. The respondent now states that it does "not now rely upon the fraud finding as an alternative basis for the judgment of denaturalization." In the light of its concession that, "in view of the state of this particular record," the finding of fraud was not supported by sufficient evidence, we proceed upon that premise.

cuit. At the time there were pending in that court appeals from three other denaturalization judgments by the same District Court. *United States* v. *Sweet*, 106 F. Supp. 634; *United States* v. *Chomiak*, 108 F. Supp. 527; and *United States* v. *Charnowola*, 109 F. Supp. 810. Petitioner's counsel appeared and argued for the appellants in each of those three cases. Before the petitioner's brief was due, the Court of Appeals affirmed the judgments in all three of them, 211 F. 2d 118. The petitioner thereafter obtained an extension of time for filing briefs on the appeal of his case until thirty days after disposition by this Court of petitions for certiorari filed in the other three cases. When those petitions for certiorari were denied, 348 U. S. 817, the petitioner by his counsel stipulated in the Court of Appeals that his appeal should be dismissed with prejudice, and the appeal was dismissed on November 10, 1954.

On August 6, 1958, the petitioner filed his motion under Rule 60 (b)(5) and (6) to set aside the 1953 denaturalization decree. The ground for the motion, supported by an affidavit of counsel, was that in the light of this Court's opinions in two cases which had recently been decided, *Nowak* v. *United States*, 356 U. S. 660, and *Maisenberg* v. *United States*, 356 U. S. 670, "it now appears that the . . . judgment of cancellation is voidable" and "that it is no longer equitable that said judgment should have prospective application." In denying the motion the District Court held that the *Nowak* and *Maisenberg* decisions "do not as contended by Polites clearly control the instant case warranting relief from judgment," and that, in any event, the doctrine of *Ackerman* v. *United States*, 340 U. S. 193, precludes reopening a judgment under Rule 60 (b) where the movant has voluntarily abandoned his appeal, and the only ground for the motion to reopen is an asserted later change in the judicial view of

applicable law. 24 F. R. D. 401. The Court of Appeals affirmed "for the reasons set forth" by the District Court. 272 F. 2d 709.

It is the contention of the Government that the "instant case is squarely controlled by the decision of this Court in *Ackerman* v. *United States*, 340 U. S. 193, that a freely made decision not to appeal a denaturalization judgment may not be excused by permitting recourse to Rule 60 (b)(6) as a substitute for appeal." In that case Mr. and Mrs. Ackerman and a relative, Keilbar, had been denaturalized after a joint hearing. Keilbar appealed. The Ackermans did not. On appeal the judgment of denaturalization against Keilbar was reversed upon a stipulation by the Government that the evidence was insufficient to support it. *Keilbar* v. *United States*, 144 F. 2d 866. The Ackermans thereafter filed a motion under Rule 60 (b) to vacate the denaturalization judgments against them. They alleged that they had failed to appeal from the judgments because of financial inability and in reliance upon the advice of a government official whom they trusted, the official who was in charge of the detention camp in which they had been placed following their denaturalization. After reviewing these allegations the Court held that the District Court had been correct in denying the motion to reopen the judgments, holding that "[s]ubsection (6) of Rule 60 (b) has no application to the situation of petitioner." 340 U. S., at 202.

What the Court said in *Ackerman* is of obvious relevance here:

> "Petitioner made a considered choice not to appeal, apparently because he did not feel that an appeal would prove to be worth what he thought was a required sacrifice of his home. His choice was a risk, but calculated and deliberate and such as follows a free choice. Petitioner cannot be relieved of such a

choice because hindsight seems to indicate to him that his decision not to appeal was probably wrong considering the outcome of the *Kelbar* case. There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from." 340 U. S., at 198.

In the present case it is not claimed that the decision not to appeal was anything but "free, calculated, and deliberate." Indeed, there is not even an indication in this case, as there was in *Ackerman*, that the choice was influenced by reliance upon the advice of a government officer. The only claim is that upon the advice of the petitioner's own counsel the appeal was abandoned because there seemed at the time small likelihood of its success, and that some four years later the applicable law was "clarified" in the petitioner's favor.

Despite the relevant and persuasive force of *Ackerman*, however, we need not go so far here as to decide that when an appeal has been abandoned or not taken because of a clearly applicable adverse rule of law, relief under Rule 60 (b) is inflexibly to be withheld when there has later been a clear and authoritative change in governing law. The fact of the matter is that that situation is not presented by this case. Without assaying by hindsight how hopeless the prospects of the petitioner's appeal may have appeared at the time it was abandoned,[9] it is clear that the later decisions of this Court upon which his motion to vacate relied did not in fact work the con-

[9] It is worth pointing out, with respect to the three other denaturalization judgments whose affirmance by the Sixth Circuit assertedly led to the petitioner's decision not to pursue his appeal, that each was decided upon the facts of its own individual record. 211 F. 2d 118. And it need hardly be repeated at this late date that the refusal by this Court to review those cases imported "no expression of opinion on the merits." *Sunal* v. *Large*, 332 U. S. 174, 181; see *Maryland* v. *Baltimore Radio Show*, 338 U. S. 912.

trolling change in the governing law which he asserted. The decisions in question are *Nowak* v. *United States*, 356 U. S. 660, and *Maisenberg* v. *United States*, 356 U. S. 670.

Petitioner contends that the *Nowak* and *Maisenberg* decisions reject the grounds relied upon by the District Court in revoking petitioner's citizenship in 1953. In the petitioner's denaturalization proceeding, the court held that a charge of illegal procurement of citizenship under the Nationality Act of 1940 could be sustained by clear, unequivocal and convincing evidence that (a) petitioner had been a member of the Communist Party within ten years immediately preceding the day he filed his citizenship application, and (b) the Communist Party had advised, advocated, or taught overthrow of the Government by force or violence during that period. Petitioner claims that this interpretation of the statute is erroneous because it fails to take into account the question of the petitioner's knowledge of the Party's activities. It was the claim of the petitioner's motion that *Nowak* and *Maisenberg* establish that "a charge of illegal procurement of citizenship based upon alleged membership in the Communist Party, cannot be sustained where the evidence fails to show . . . that the defendant was aware that the organization was engaged in the kind of illegal advocacy proscribed by law during the period of his membership therein." But the *Nowak* and *Maisenberg* decisions neither support nor oppose this interpretation of the 1940 Act. Those cases simply do not deal with the question.

In *Nowak* the petitioner had acquired his citizenship under the Nationality Act of 1906. That statute did not specifically prohibit citizenship to a member of an organization which advocated overthrow of the Government by force and violence. It did require an alien to have been "attached to the principles of the Constitution of the

United States" for at least five years preceding his application for citizenship.[10] In order to show that Nowak had illegally procured his citizenship because during the five years preceding his naturalization he had not been "attached" to constitutional principles, the Government undertook to prove that he had been a member of the Communist Party with knowledge that the Party advocated the overthrow of the Government by force and violence. This Court found that the record contained adequate proof that Nowak had been a member of the Party during the pertinent five-year period, and it proceeded on the assumption that the evidence of the Party's illegal advocacy was sufficient. The Court held, however, that the Government had not established, under the standard required in denaturalization cases, that Nowak had known of the Party's advocacy of forcible governmental overthrow. Accordingly, the Court concluded that the Government had failed to prove Nowak's "state of mind," 356 U. S., at 666, his lack of "attachment" to constitutional principles, by the clear, unequivocal, and convincing evidence which is required. Cf. *Schneiderman v. United States*, 320 U. S. 118. *Maisenberg* was different in that the ultimate issue involved was whether the petitioner's citizenship had been obtained "by concealment of a material fact [and] willful misrepresentation."[11]

[10] Paragraph 4 of § 4 of the Act, 34 Stat. 596, 598, as amended, 8 U. S. C. (1934 ed.) § 382, provided that no alien should be admitted to citizenship unless immediately preceding his application he had resided continuously within the United States for at least five years and that during this period "he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same."

[11] The Government was seeking to denaturalize Maisenberg under the provisions of § 340 (a) of the Immigration and Nationality Act of 1952, 66 Stat. 260, 8 U. S. C. § 1451 (a). Under that statute illegal procurement as such is not a specific basis for cancellation of a certificate of naturalization.

356 U. S., at 671. But there, too, the Court held that the Government had failed to prove the petitioner's state of mind, her lack of "attachment" to the constitutional principles required by the 1906 Act, by its proof of her Communist Party membership and of the Party's advocacy.[12]

In the present case, by contrast, the District Court held that determination of the issue of illegal procurement did not involve an inquiry into the petitioner's state of mind. Unlike Nowak and Maisenberg, the petitioner was naturalized under the Nationality Act of 1940, which withheld the right of citizenship to any alien who had been a member of a particular kind of organization during the statutory period.[13] The evidence that the petitioner was a "member of the Party" in every meaningful sense was abundantly shown. Cf. *Galvan* v. *Press*, 347 U. S. 522; *Rowaldt* v. *Perfetto*, 355 U. S. 115; *Niukkanen* v. *McAlexander*, 362 U. S. 390. The District Court found that the proof was also clear, unequivocal, and convincing that the organization to which the petitioner had belonged was in the category proscribed by the 1940 Act.[14] Those findings remain completely unaffected by anything that was decided or said in either *Nowak* or *Maisenberg*.

As the District Court viewed the issue of illegal procurement in this case, there was no occasion, as in *Nowak* and *Maisenberg*, to establish by inference or imputation the petitioner's personal beliefs, his "attachment" or lack of it. The court was concerned only with objective

[12] In view of this conclusion the Court did not reach the further question under the 1952 Act whether the Government had adequately proved that petitioner had misrepresented her attachment or concealed a lack of attachment. See 356 U. S., at 672, note 3.

[13] See note 4, *supra*.

[14] It is to be emphasized that neither in his motion to set aside the denaturalization judgment nor in the supporting affidavit did the petitioner allege the existence of any new or mitigating evidence upon these factual issues. Cf. *Klapprott* v. *United States*, 335 U. S. 601.

facts—the petitioner's membership and the Party's purpose. Upon the basis of its findings as to these factual issues, the Court held that the "government must prevail on the jurisdictional question that defendant was not eligible to become a citizen either when he filed his naturalization petition or when he took the oath . . . ." 127 F. Supp., at 772. As the issue was determined, therefore, the case was consistent with many decisions in which this Court has ruled that a certificate of citizenship is cancellable on the basis of illegal procurement if there has not been strict compliance with the conditions imposed by Congress as prerequisites to acquisition of citizenship. See *Maney* v. *United States*, 278 U. S. 17; *United States* v. *Ness*, 245 U. S. 319; *United States* v. *Ginsberg*, 243 U. S. 472; cf. *Schneiderman* v. *United States*, 320 U. S. 118, 163 (concurring opinion).

The validity of the District Court's interpretation of § 305 is not before us; we are not here directly reviewing the 1953 decision. We hold only that the decisions in *Maisenberg* and *Nowak* were not effective to alter the law controlling the petitioner's case.

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 25.—October Term, 1960.

Gus Polites, Petitioner, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[November 21, 1960.]

Mr. Justice Brennan, with whom The Chief Justice, Mr. Justice Black, and Mr. Justice Douglas join, dissenting.

In my view, the District Court should have exercised its discretion under Fed. Rules Civ. Proc., 60 (b) to determine whether it is any longer equitable that this judgment of denaturalization should have prospective application. The Court's opinion, although it refers to *Ackermann* v. *United States*, 340 U. S. 193, as "relevant and persuasive," expresses no definite view on the availability of Rule 60 (b) in this situation, but instead decides on the merits that the state of the law is substantially unchanged since the entry of the denaturalization decree. I would confirm the power of the District Court to act under Rule 60 (b), but remand the cause to that court so that it may, in the first instance, decide what effect the *Nowak* and *Maisenberg* decisions have on petitioner's case.

First, it is necessary to point out that *Ackermann* is not in point. For one thing relief there was sought only under subdivisions (1) and (6) of Rule 60 (b), not, as here, under subdivision (5) as well. But more fundamentally, *Ackermann* was a case in which petitioners could have secured a reversal of their denaturalization simply by appealing. Since they deliberately chose not to appeal, this Court held Rule 60 (b) unavailable. Here also petitioner chose not to appeal, but only because of the hopelessness of any chance of success. The Court of

Appeals had affirmed judgments in three companion cases, and this Court had denied certiorari. True, denial of certiorari has no legal significance, and petitioner might have doggedly pursued his appellate remedies to the end. But as a practical matter such a course of action would have been futile. So petitioner's case must be considered not as one in which he could have appealed successfully, but as one in which he in fact did appeal unsuccessfully.

In that situation it was the law long before the promulgation of Rule 60 (b) that a change in the law after the rendition of a decree was grounds for modification or dissolution of that decree insofar as it might affect future conduct. *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 18 How. 421, 431–432. This principle is rooted in the practice of courts of equity and is well settled in the vast majority of the States. See 7 Moore, Federal Practice (2d ed. 1955), ¶ 60.26 [4]; *Ladner* v. *Siegel*, 298 Pa. 487, 148 A. 699. Perhaps before the merger of law and equity in 1938 a denaturalization proceeding was an "action at law." But a decree of denaturalization is a determination of status which has prospective effect, and there is no reason why in modern times it should not be governed by equitable principles.

The decisions under Rule 60 (b)(5) (adopted by the 1948 amendments to the Federal Rules of Civil Procedure) continue this history of equitable adjustment to changing conditions of fact and law. *McGrath* v. *Potash*, 199 F. 2d 166, a case decided under subdivision (6), but to which subdivision (5), by the respondent's admission, was equally applicable, is directly in point. There several aliens obtained a decree from a District Court enjoining the Attorney General from proceeding to deport them without complying with the hearing requirements of the Administrative Procedure Act. Pending appeal by the Government, this Court held in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, that the Administrative Procedure

Act did indeed apply to deportation proceedings. Seeing that further resistance would be futile, the Attorney General dismissed his own appeal by agreement. Shortly thereafter Congress overruled the *Wong Yang Sung* decision and expressly declared that proceedings relative to the exclusion or expulsion of aliens should not be subject to the Administrative Procedure Act. 64 Stat. 1048. The Government then moved under Rule 60 (b) for a dissolution of the injunction against it, relying on this change in law, and the motion was granted." The United States in this case seeks to distinguish that decision by asserting that here "the continuing force of the decree derives from facts fully accrued and litigated in the original judgment." True enough; but here, as in *McGrath*, although the facts were fully accrued at the time of the decree and have not changed, the law has (so petitioner asserts) radically changed, and in that situation it is unjust to give the judgment prospective effect.

The cases under Rule 60 (b)(5) relied on by the United States are readily distinguishable. In *Title* v. *United States*, 263 F. 2d 28, cert. denied, 359 U. S. 989, *Elgin Nat'l Watch Co.* v. *Barrett*, 213 F. 2d 776, and *Berryhill* v. *United States*, 199 F. 2d 217, it was entirely possible that the remedy by appeal would have been successfully invoked. And in *Collins* v. *City of Wichita*, 254 F. 2d 837, a modification of the judgment would have retroactively disturbed existing rights and financial reliance on the judgment. In *Scotten* v. *Littlefield*, 235 U. S. 407, relief was denied in a situation virtually identical to this case. But the point actually decided there was that a bill of review would not lie, and it is universally conceded that Rule 60 (b) is not limited to those situations where the old confusing collateral remedies would have been available.

In sum, the District Court need "not abdicate its power to revoke or modify its mandate if satisfied that what it

has been doing has been turned through changing circumstances into an instrument of wrong." *United States v. Swift & Co.*, 286 U. S. 106, 114–115. It is revolting that petitioner should be subject to deportation because of a decree which he could not successfully have attacked on appeal and which subsequent events may have rendered erroneous. The principle of finality is not offended by modification which disturbs no accured rights and concerns only future conduct.

Accordingly, I would reverse the judgment of the Court of Appeals and remand this case to the District Court with directions to exercise its discretion under Rule 60 (b)(5).